

The Commonwealth of Massachusetts
Committee for Public Counsel Services
44 Bromfield Street, Boston, MA 02108-4909

WILLIAM J. LEAHY
CHIEF COUNSEL

TEL: (617) 482-6212
FAX: (617) 988-8495

PATRICIA A. WYNN
DEPUTY CHIEF COUNSEL
PRIVATE COUNSEL DIVISION

ANDREW SILVERMAN
DEPUTY CHIEF COUNSEL
PUBLIC DEFENDER DIVISION

Writer's Direct Dial Number

Report to the Legislature on the Committee for Public Counsel Services

The Fiscal Year 2003 budget for the Commonwealth, in budget line 0321-1502, requires the Committee for Public Counsel Services (CPCS) to

Submit a report to the clerks of the house of representatives and senate, The speaker and minority leader of the house of representatives, the President and minority leader of the senate and the house and senate Committees on ways and means not later than January 31, 2003 that shall include, but not be limited to, the following: (a) the number of clients assisted by the committee in the prior fiscal year; (b) any proposed expansion of legal services delineated by type of service, target population, and cost; (c) the total number of persons who received legal services by said committee, by type of case and geographic location; (d) the costs for services rendered per client, by type of case and geographic location; (e) the amount paid, if any, to the committee by clients for services rendered, by type [sic] case and geographic location; (f) the average cost for services rendered by said committee per type of case; (g) the average number of hours spent per attorney or staff per type of case; (h) the feasibility of the implementation of a flat rate compensation system based on the type of case.

Herewith please find our report.

- (a) In fiscal year 2002, CPCS provided legal representation to clients in 247,350 cases. Please see section (c) of this report for distribution of these cases by case type and geographic location. In addition, CPCS provided representation to 13,754 clients "for bail only" and to 2,255 clients for representation at bail petition hearings.
- (b) CPCS legal services are restricted to those cases, both civil and criminal, in which all persons, including the indigent, are **guaranteed** the assistance of counsel by statute, judicial decision or court rule. CPCS has not sought to expand the scope of the legal services it provides. Indeed, by its active participation in the Commission on Indigency Verification, by its repeated proposals for stricter scrutiny of indigency findings, and by its advocacy

for reform of General Laws Chapter 277, Section 70C, the civil infraction statute, CPCS has aggressively sought to control the frequency of its assignments.

Notwithstanding these efforts, the scope of CPCS services has been expanded by a number of legislative enactments in recent years: (1) The enactment (1996) and reenactment (1999) of the sex offender registration statute has resulted in significant appellate litigation, and is now a rapidly increasing source of new cases which require the assignment of counsel both at hearings before the Sex Offender Registry Board, G.L. c.6, §178L, and in the Superior Court, c.6, §178M. To mitigate the impact and expense of the SORB cases, CPCS has proposed a much shorter "reach-back" provision than the current law, which covers offenses dating all the way back to the 1970s. (2) The 1999 enactment of a new sexually dangerous persons commitment law, G. L. c.123A, §§12 through 16, which authorized post-imprisonment lifetime civil commitments and requires both the assignment of counsel and the payment of expert witnesses, is another new responsibility for which CPCS has received no additional staffing, but which has resulted in significant additional expense. (3) The number of Probation Surrender assignments has skyrocketed in recent years. (4) In every Legislative session, new laws are enacted, and old laws are amended. Frequently, these statutory changes either add new case responsibilities and costs to this agency, or increase the cost of providing legal representation in an existing category of cases. For example, during the 2002 session, the following laws were enacted which increase CPCS costs in this and every future fiscal year:

- Chapter 13, expanding the crime of incest
- Chapter 35, creating new crimes of aggravated assault and battery, and aggravated assault and battery by means of a dangerous weapon
- Chapter 161, expanding the definition of obscene material
- Chapter 302, eliminating ten year look-back for purpose of determining subsequent OUI offenses
- Chapter 313, creating new protections against terrorism
- Chapter 322, creating the new crime of reckless endangerment to children
- Chapter 385, which expands the crime of enticing children

CPCS proposes no expansion of its legal representation. However, in the critical area of representing children and families, CPCS does propose two modest steps toward a "mixed delivery" system, in place of complete reliance on assigned private counsel. These proposals would provide limited staff attorney representation in juvenile delinquency and youthful offender cases in New Bedford, Springfield and Worcester; and would establish a children and family law office in metropolitan Boston, where

the cost of exclusively assigning private counsel is highest. Each of these initiatives would emulate the mix of staff and assigned private counsel representation which has long been the norm in our criminal defense representation. Each would improve the quality of the representation we provide to poor children and families. The cost of each would be significantly offset by a corresponding reduction in private counsel costs. Details of these proposals may be found in the CPCS Fiscal Year 2004 budget proposal.

- (c) (i) Of the 247,350 assignments in which CPCS provided case representation, 204,420 or 82.6% were criminal or juvenile delinquency matters, and 42,930 or 17.4% were civil cases (for example, Care and Protection, mental health commitment or medication cases, Children in Need of Services, sex offender registration and dissemination).

(ii) The breakdown of cases by county in FY02 was as follows:

Suffolk	46,226	18.7%
Middlesex	35,365	14.3%
Worcester	30,960	12.5%
Essex	29,158	11.8%
Hampden	28,474	11.5%
Bristol	22,627	9.1%
Plymouth	17,771	7.2%
Norfolk	15,307	6.2%
Barnstable	7,854	3.2%
Berkshire	5,164	2.1%
Hampshire	5,119	2.1%
Franklin	2,994	1.2%
Dukes and Nantucket	331	0.1%

- (d) (i) The average cost of providing legal representation in a CPCS case (not including "bail petition" and "bail only" representation) during FY2002 was \$343.86. This includes, in addition to attorney compensation, the costs of training, certification, assignment, performance oversight, bill payment and auditing for private attorneys, and office leases, supervision, equipment and supplies for CPCS staff attorneys. The average cost of providing legal representation in a criminal case in FY02 was \$286.64. The average cost of legal representation in a civil case was \$616.37.

(ii) The cost breakdown by county was as follows:

<u>County</u>	<u>Total Cost</u>	<u>% of Total</u>	<u>Average Cost Per Case</u>
Suffolk	\$18,812,791	22.1%	\$406.97
Middlesex	\$13,131,100	15.4%	\$371.30
Essex	\$10,126,821	11.9%	\$347.31
Hampden	\$9,617,471	11.3%	\$337.76
Worcester	\$8,020,910	9.4%	\$259.07
Bristol	\$6,842,088	8.0%	\$302.39
Plymouth	\$5,671,334	6.7%	\$319.13
Norfolk	\$5,159,677	6.1%	\$337.08
Barnstable	\$2,743,529	3.2%	\$349.32
Hampshire	\$2,279,944	2.7%	\$444.61
Berkshire	\$1,605,153	1.9%	\$310.84
Franklin	\$912,461	1.1%	\$304.76
Dukes and Nantucket	\$131,442	0.2%	\$397.11

(e) CPCS receives no funds from clients for the legal representation which it provides. During FY02, however, the Commonwealth's General Fund received a total of \$6,294,072 in payments from CPCS clients for legal representation provided by this agency. Of this total, \$3,851,049 (61.2%) was paid by clients who were determined by a judge to be partially indigent under Supreme Judicial Court Rule 3:10 and ordered to pay a "reduced fee" toward the cost of assigned counsel pursuant to G.L. c.211D, §2. The remaining \$2,443,023 (38.8%) was paid by clients who, notwithstanding their indigency, were ordered to pay a "legal counsel fee" of one hundred dollars pursuant to G.L. c.211D, §2A. It should be noted that this counsel fee, which was already the highest in the nation at \$100, was increased to \$150 in the Fiscal Year 2003 budget. It should further be noted that there exists wide disparity among courts in their counsel fee collections, as we reported to the House and Senate Committees on Ways and Means and to the Chief Justice for Administration and Management of the Trial Court in March, 2002.

(f) The average cost of providing legal representation in criminal and civil cases is reported above, in section (d) of this report.

(g) The average number of billable hours spent per attorney is 8 hours in criminal cases, and 15 hours in civil cases. Please note that these averages may understate the actual time spent per court case, as these averages do not factor in cases in which successor counsel has been assigned.

- (h) A flat rate compensation system based on the type of case is not feasible. Such a system for criminal cases, except in Suffolk County, was in effect at the time that CPCS began its operations in 1984. It was thoroughly discredited by the 1986 Statewide Evaluation of the Massachusetts Bar Advocate Program conducted by the National Legal Aid and Defender Association. As a result of the report's conclusion that a flat rate system of compensation was "inappropriate", and "establishe[d] a disincentive for thorough preparation and aggressive defense advocacy[.]" the Legislature in its 1987 budget extended the hourly payment system statewide.

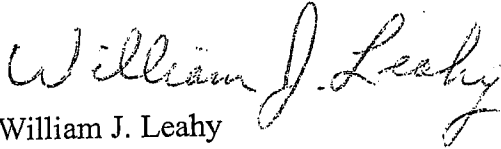
Nationally, Massachusetts pays among the lowest hourly rates to its assigned private counsel, who perform an essential public service as well as a constitutionally required service by implementing the right-to-counsel decision in Gideon v. Wainwright, 372 U. S. 335 (1963). The funded hourly rates of \$30, \$39 and \$54 per hour are significantly lower than the hourly compensation which is paid to counsel in all Federal and almost all State courts. In the exercise of its responsibility under G.L. c.211D, §11, to "establish rates of compensation payable, subject to appropriation, to all counsel who are appointed or assigned to represent indigents within the private counsel division[.]" the Committee for Public Counsel Services periodically establishes rates of compensation which comport with constitutional standards, and are consistent with the rates paid in other American jurisdictions. The most recent rates, which were authorized by unanimous vote of the Committee in December, 2002, are as follows:

- i. \$60 per hour: District Court Criminal, Juvenile Delinquency, CHINS, Mental Health;
- ii. \$90 per hour: Care and Protection, Youthful Offender, Superior Court Criminal, SDP, SORB;
- iii. \$120 per hour: Murder

As this report is filed, CPCS awaits judicial action in a lawsuit entitled Machado et al v. Leahy et al, Bristol Superior Court civil action No. 02-00514. This action, which was filed by a group of assigned private counsel who accept CPCS assignments, alleges that the inadequacy of the compensation they receive for the legal representation they provide to the poor violates the Massachusetts Declaration of Rights and the Sixth and Fourteenth Amendments to the United States Constitution, by "creating a severe and unacceptably high risk that indigent persons in proceedings implicating their liberty

interests will be denied their rights to meaningful and effective assistance of counsel and to due process of law[.]” Amended complaint, paragraph sixty-two, Count I. There is a compelling need to increase substantially the hourly rates of compensation paid to assigned counsel who represent indigent CPCS clients.

Respectfully submitted,

A handwritten signature in cursive script that reads "William J. Leahy". The signature is written in dark ink and is positioned above the printed name and title.

William J. Leahy
Chief Counsel

Dated: February 3, 2003